

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAINBOW BUSINESS SOLUTIONS, doing  
business as PRECISION TUNE AUTO  
CARE; DIETZ TOWING, INC.; THE  
ROSE DRESS, INC.; VOLKER VON  
GLASENAPP; JERRY SU; VERENA  
BAUMGARTNER; TERRY JORDAN; ERIN  
CAMPBELL; and LEWIS BAE,

Plaintiffs,

v.

MERCHANT SERVICES, INC.; NATIONAL  
PAYMENT PROCESSING; UNIVERSAL  
MERCHANT SERVICES LLC; UNIVERSAL  
CARD, INC.; JASON MOORE; NATHAN  
JURCZYK; ROBERT PARISI; ERIC  
MADURA; FIONA WALSH; ALICYN ROY;  
MBF LEASING LLC; NORTHERN  
FUNDING, LLC; NORTHERN LEASING  
SYSTEMS, INC.; JAY COHEN; LEONARD  
MEZEI; SARA KRIEGER; SAM BUONO;  
and SKS ASSOCIATES, LLC,

Defendants.

No. C 10-1993 CW

ORDER DENYING  
DEFENDANTS'  
MOTIONS TO STAY  
(Docket Nos. 604,  
605)

United States District Court  
For the Northern District of California

On April 24, 2014, Defendants Northern Leasing Systems, Inc.;  
MBF Leasing, LLC; Northern Funding, LLC; SKS Associates, LLC; Jay  
Cohen; Sara Krieger; Leonard Mezei; and Sam Buono filed a motion  
to stay this case pending the resolution of the Federal Civil  
Procedure Rule 23(f) petitions Defendants filed with the Ninth  
Circuit Court of Appeals. In those petitions, Defendants seek  
permission from the Ninth Circuit to appeal this Court's December  
20, 2013 order granting in part Plaintiffs' motion for class  
certification and its March 17, 2014 order granting Plaintiff Erin  
Campbell's motion for reconsideration of the December 20, 2013  
order. On April 29, 2014, Defendants filed a motion for a

1 temporary stay pending hearing on their April 24, 2014 motion to  
2 stay. Plaintiffs have filed an opposition to the April 29, 2014  
3 motion for a temporary stay.<sup>1</sup> Having considered the parties'  
4 papers and the record in this case, the Court DENIES the motion  
5 for a stay without prejudice to renewal if the Ninth Circuit  
6 grants Defendants' Rule 23(f) petitions (Docket No. 604) and  
7 DENIES as moot the motion for a temporary stay (Docket No. 605).

#### 8 LEGAL STANDARD

9 Federal Rule of Civil Procedure 23(f) provides a mechanism  
10 for interlocutory appeal of a court's order granting or denying  
11 class certification. However, such appeals do "not stay  
12 proceedings in the district court unless the district court or the  
13 court of appeals so orders." Fed. R. Civ. P. 23(f). "A stay is  
14 not a matter of right, even if irreparable injury might otherwise  
15 result." Nken v. Holder, 129 S. Ct. 1749, 1760 (2009) (citation  
16 and internal quotation marks omitted). Instead, it is "an  
17 exercise of judicial discretion," and "the propriety of its issue  
18 is dependent upon the circumstances of the particular case." Id.  
19 (citation and internal quotation and alteration marks omitted).  
20 The party seeking a stay bears the burden of justifying the  
21 exercise of that discretion. Id.

22 The standard for determining whether to grant a stay pending  
23 appeal is similar to the standard for issuing a preliminary  
24 injunction. Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663  
25 (9th Cir. 1988). A party seeking a stay must establish that he is

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27 <sup>1</sup> Plaintiffs' response to Defendants' April 24, 2014 motion  
28 to stay is not due until May 8, 2014.

1 likely to succeed on the merits, that he is likely to suffer  
2 irreparable harm in the absence of relief, that the balance of  
3 equities tips in his favor, and that a stay is in the public  
4 interest. Nken, 129 S. Ct. at 1761 (noting overlap with Winter v.  
5 Natural Resources Defense Council, 555 U.S. 7 (2008)). The first  
6 two factors of this standard "are the most critical." Id. Once  
7 these factors are satisfied, courts then assess "the harm to the  
8 opposing party" and weigh the public interest. Id. at 1762.

9 An alternative to this standard is the "substantial  
10 questions" test. Under this test, "serious questions going to the  
11 merits and a balance of hardships that tips sharply towards the  
12 plaintiff" can support the issuance of a stay, "so long as the  
13 plaintiff also shows that there is a likelihood of irreparable  
14 injury and that the injunction is in the public interest." See  
15 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135  
16 (9th Cir. 2011) (holding that the substantial questions test, for  
17 purposes of a motion for preliminary injunction, survives Winter,  
18 555 U.S. at 7).

#### 19 DISCUSSION

20 Defendants contend that they are entitled to a stay under the  
21 substantial question test based on questions regarding the  
22 interpretation of the Supreme Court's recent decision in Comcast  
23 v. Behrend, 133 S. Ct. 1426 (2013). Even assuming that  
24 substantial questions exist, Defendants have failed to establish a  
25 likelihood of irreparable injury if the stay is denied or that the  
26 stay is in the public interest. Defendants assert that, if the  
27 stay is denied, they will be forced to "deliver class notice to  
28 tens of thousands of purported members of the certified classes

1 and continu[e] to engage in costly discovery, including motion  
2 practice." Docket No. 605 at 2. However, Defendants themselves  
3 acknowledge that "Rule 23(f) appeals are expected to be resolved  
4 quickly." Docket No. 604 at 12. Moreover, as Plaintiffs point  
5 out, class notice cannot happen without court approval, and no  
6 motion for approval has been made.

7 CONCLUSION

8 Accordingly, the Court DENIES WITHOUT PREJUDICE Defendants'  
9 motion for a stay pending appeal (Docket No. 604). If the Ninth  
10 Circuit grants Defendants' Rule 23(f) petitions and agrees to hear  
11 Defendant's appeal of the class certification orders, Defendants  
12 may again move to stay the case. In the meantime, the parties  
13 should continue with discovery and scheduled hearing dates. The  
14 Court will not order any class notice to be sent until after the  
15 Ninth Circuit has ruled on Defendants' Rule 23(f) petitions.  
16 Defendants' administrative motion for a temporary stay is DENIED  
17 as moot (Docket No. 605).

18  
19 IT IS SO ORDERED.

20  
21 Dated: 5/5/2014

  
CLAUDIA WILKEN  
United States District Judge